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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. DAVID MORENO, Defendant and Appellant.	B262912 (Los Angeles County Super. Ct. No. VA131404)

APPEAL from the judgment of the Superior Court of Los Angeles County. Patrick T. Meyers, Judge. Affirmed.

J. Kahn, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Marc A. Kohm and Paul S. Thies, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant and appellant David Moreno was convicted by jury of attempted rape, assault with intent to commit a felony, and second degree robbery, and sentenced to a nine-year state prison term. Defendant contends his convictions on the rape and assault charges must be reversed due to the prosecution's late disclosure of physical evidence on the third day of trial in violation of state discovery statutes and *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*). Defendant further argues there is insufficient evidence to support the robbery conviction.

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On the evening of August 10, 2013, E.C.,[1] Adira Carbajal, Sam Velador and defendant were all patrons at a bar called La Cabana in the city of Bell. After the bar closed, an incident occurred in the parking lot that ultimately involved all four individuals, and resulted in the filing of criminal charges against defendant. The case proceeded to a jury trial in February 2015 on three counts: assault with intent to commit a felony and attempted rape of E.C. (Pen. Code, § 220, subd. (a)(1), § 261, subd. (a)(2), § 664; counts 2 & 6), and second degree robbery of Ms. Carbajal (§ 211; count 3). The testimony and evidence received at trial revealed the following material facts and events.

1. Prosecution Evidence

Around 8:00 p.m. on August 10, E.C. went to La Cabana, a restaurant and bar where a friend of hers worked as a bartender. Over the course of the evening, E.C. probably drank 10 to 12 beers. She did not know defendant, who was also there drinking, but she had a beer with him at one point. E.C. conceded she was so drunk she could not recall if she was "making out" with defendant inside the bar.

Ms. Carbajal, E.C.'s roommate, arrived later in the evening, close to midnight. While E.C. was dancing with two other friends, Ms. Carbajal struck up a conversation with Mr. Velador, who had arrived alone a few hours earlier for dinner. He was not

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[1] We refer to the victim of the sexual offenses by her initials to protect her privacy.

acquainted with either E.C. or Ms. Carbajal before that evening. Ms. Carbajal and Mr. Velador had a few beers together while they talked.

Shortly before the bar closed, defendant approached Ms. Carbajal while she was walking to the women's bathroom, and grabbed her arm. Defendant said he was a taxi driver and could give her a ride home. She told him no, pulled her arm away, and continued on to the bathroom. When she returned, Ms. Carbajal did not see E.C. or defendant in the bar, but Mr. Velador was still seated at their table.

E.C. had gone outside with defendant so he could smoke a cigarette. She admitted she had been "drunk," and could not remember everything that happened, but she denied agreeing to have sex with defendant. E.C. recalled falling down as she stepped outside the door, and defendant helped her up. The next thing she remembered was lying inside a truck in the parking lot, on the passenger side seat. Her dress was pulled up around her waist and defendant was grabbing her legs. He was standing outside the truck between her legs, facing her. She yelled at him and tried to sit up, but defendant repeatedly pushed her back down hard with both hands. Defendant grabbed her underwear, tearing them.[2] E.C. was "crying and yelling and scared."

Because E.C. was supposed to drive home with her, Ms. Carbajal decided to go outside to look for her. When she stepped outside, she heard someone screaming "let me go." She did not know it was E.C. at the time, but she could see across the parking lot that a woman was lying on the seat of a white truck and defendant was hitting her. When she ran over, Ms. Carbajal saw that E.C. was the woman in the truck. Defendant was "on top of her" and his pants were down. She saw E.C. trying to push him away, and defendant pushing her back down on the seat. Ms. Carbajal ran up to defendant, pushed

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[2] On both direct and cross-examination, E.C. testified that defendant tore her "undergarments" and that the police took possession of her underwear at the hospital. When she was called back to the witness stand, she identified her underwear as the pair she was wearing on the night of the incident. We reserve a more detailed discussion of the facts related to the presentation of the underwear as evidence by the prosecution in part 1 of the Discussion below.

him and tried to hit him. Defendant told her "not to butt in." Defendant hit her in the face and Ms. Carbajal continued to struggle with him. At some point during the struggle, Ms. Carbajal ripped defendant's shirt. She tried to take a picture of defendant with her cell phone and then ran to the back of the truck to take a picture of his license plate.

Mr. Velador followed Ms. Carbajal outside. He heard Ms. Carbajal yelling, "She's getting raped. She's getting raped." Mr. Velador saw that E.C. was lying on the front seat of a truck with her dress up around her waist. She was naked below the waist. Ms. Carbajal was at the back of the truck, and it appeared she was taking a picture of the license plate.

Defendant turned away from E.C. and went over to Ms. Carbajal, still standing behind his truck, and snatched the cell phone from her hand. She screamed several times at him to give it back, but he refused and held the phone away from her. Defendant started to run off, but Mr. Velador interceded. He grabbed defendant and told him to give the phone back to Ms. Carbajal. When defendant continued to refuse, Mr. Velador grabbed the phone out of defendant's hand and gave it back to Ms. Carbajal. Defendant responded by punching Mr. Velador, so he punched him back, and defendant fell on the ground. When defendant got up, he started swinging at Mr. Velador again, so he punched him again. Defendant fell to the ground a second time and then got up and ran away.

Mr. Velador did not recall seeing defendant's shirt being torn, and he denied seeing any money fall from defendant's shirt pocket or taking any money from defendant.

Once Ms. Carbajal had her phone back, she called 911. Officer Jesse Garcia of the Bell Police Department arrived on the scene within a few minutes. E.C. was crying "hysterically." E.C. also appeared to be intoxicated, but she was able to reasonably answer Officer Garcia's questions. E.C. reported that defendant did not penetrate her vaginally with his penis but he did so with his fingers.

Officer Jonathan Walker also arrived on the scene and interviewed Mr. Velador. Mr. Velador did not appear to be intoxicated and was able to clearly answer Officer

Walker's questions. Ms. Carbajal, who was also interviewed on the scene, did not exhibit signs of intoxication either.

Around 1:00 the following afternoon, defendant went to the Bell police station and spoke to Officer Steve Carrera. Defendant reported that his white truck had been impounded from the parking lot of La Cabana, and that he had been assaulted. Officer Carrera noticed defendant had a swollen eye and some scratches on his face and that he looked like the suspect who remained "at large" for the crimes that had been committed at La Cabana. Officer Carrera arrested defendant.

2. Defense Evidence

Defendant arrived at La Cabana on August 10 close to midnight. He had about $500 to $600 in his shirt pocket from work. Defendant was already drunk because he had been drinking earlier in the evening. E.C. approached him at the bar. He did not know her but she asked him about having a drink. He paid for them to get some beers and then E.C. let him hug her and "touch her," on her legs and arms, and also on her vagina, but only through her clothes. E.C. reciprocated.

At some point, defendant went outside the bar, and E.C. followed him out. She asked for a cigarette. They stood outside for a few minutes, smoking. They then both walked over to his truck in the parking lot. Defendant denied forcing E.C. inside. They both got in voluntarily and defendant tried to start the engine. He planned on going to a hotel. However, the truck would not start, so defendant got out and walked around to the passenger side of the truck. E.C. had the door open. Defendant and E.C. began to embrace and kiss and she laid back on the seat. Defendant denied tearing E.C.'s underwear. He got inside the truck with her, but then E.C. "suddenly" slapped him. She did not yell at him or scream anything out loud, but her conduct scared him, so he backed off and walked towards the front of the truck. Some people came over and started to beat him. He was hit in the face, knocked to the ground several times, and his shirt was torn off which contained most of his money in the pocket. Defendant then ran away and called his cousin to pick him up. He did not call the police, because he "never call[ed] 'em."

Defendant could not recall anything about a cell phone and was not sure of the exact number of people who assaulted him. He explained that he was fairly drunk, and so was E.C.

After his cousin dropped him off at home, defendant called his boss, Oscar Beltran, to explain that he had been assaulted and robbed of most of the money he had collected on his job that day. Defendant delivered and retrieved portable bathrooms and other equipment, and collected payments for Mr. Beltran. His boss told him the truck had been impounded and that defendant was being accused of "something." Defendant went to his uncle's home and asked him to take him to the police station so he could report what had happened.

Byron Midence, defendant's cousin, testified he received a call from defendant after midnight, asking for a ride home. Defendant said he had been in some sort of bar fight, in part because someone accused him of taking a cell phone. Defendant said his work money had been stolen. When he picked up defendant, he looked "beat up" and his shirt was torn.

Mr. Beltran testified that defendant had been working for him making deliveries and collecting payments for about six months without incident. Mr. Beltran owned the truck that defendant used to make deliveries which was why he knew of the truck being impounded. He explained the truck did not always run well and sometimes had to be "push" started.

3. The Verdict and Sentence

The jury found defendant guilty on all three counts. Defendant was sentenced to state prison for nine years, calculated as follows: the upper term of six years on count 2, and a consecutive midterm of three years on count 3. The court imposed and stayed, pursuant to Penal Code section 654, a midterm of four years on count 6.

This appeal followed.

DISCUSSION

1. The Late Disclosure of Evidence

On the third day of trial, during the prosecution's case-in-chief, the prosecutor advised the court that earlier that morning, he had disclosed to defense counsel for the first time that he wanted to introduce E.C.'s torn underwear from the night of the incident. The prosecutor explained that the underwear had been retained as evidence by the police department after receiving them from the victim at the hospital. However, because no photograph had been taken of the underwear, the prosecutor believed they just "got missed" in his discovery disclosures which otherwise included photographs of all the physical evidence. The prosecutor conceded the underwear likely fell within the scope of the defense request for production of all trial exhibits. The prosecutor said he had no intent to "sandbag" defense counsel, and noted that the underwear was listed in the police report as evidence and that defense counsel had possession of the police report for well over a year and had never made a request to view or test the underwear.

Defendant complained the late disclosure prevented any ability to have the underwear tested, but did not respond to the prosecutor's statement that the defense had been on notice of the existence of the evidence from the police report for more than a year. Defendant did not assert any *Brady* error, nor did he request a continuance or other sanction order from the court. After the court indicated it planned to instruct the jury with CALCRIM No. 306, defense counsel submitted without additional argument.

The trial court permitted the prosecution to recall E.C. to lay a foundation for admission of the underwear, but also ruled there had been a violation of "both the letter and spirit" of the discovery statute and that it was going to instruct the jury, over the prosecution's objection, with CALCRIM No. 306.[3]

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[3] The jury was instructed with CALCRIM No. 306 as follows: "Both the People and the defense must disclose their evidence to the other side before trial, within the time limits set by law. Failure to follow this rule may deny the other side the chance to produce all relevant evidence, to counter opposing evidence, or to receive a fair trial. [¶] An attorney for the People failed to disclose the physical evidence of the underwear worn

Defendant contends the prosecution's discovery violation was unduly prejudicial, and the trial court abused its discretion in admitting the underwear as evidence. Defendant argues the appropriate sanction was exclusion of the underwear, and that the court's instruction of the jury with CALCRIM No. 306 was inadequate to cure the prejudice. Defendant maintains the prosecutor used the torn underwear as the central theme in his closing argument, and the significance of their admission as evidence therefore cannot be underestimated. He contends the late disclosure and admission of the underwear violated both Penal Code section 1054.1 and *Brady*.

"We generally review a trial court's ruling on matters regarding discovery under an abuse of discretion standard. [Citation.] In particular, 'a trial court may, in the exercise of its discretion, "consider a wide range of sanctions" in response to the prosecution's violation of a discovery order.' [Citation.]" (*People v. Ayala* (2000) 23 Cal.4th 225, 299.)

Defendant has failed to demonstrate any abuse of discretion by the court in its rulings regarding the prosecution's disclosure of the victim's underwear on the third day of trial. Defense counsel conceded below that the prosecutor had been forthcoming with discovery requests and that he did not believe the late disclosure was intentional. Defendant did not request any continuance or other sanction from the court to facilitate belated examination or testing of the underwear, and acquiesced in the court's decision to instruct the jury with CALCRIM No. 306.

The victim had already testified during both direct and cross-examination that defendant tore her underwear during the assault. Ms. Carbajal attested that she saw defendant hitting and pushing E.C. down, corroborating E.C.'s version of a nonconsensual, forceful assault. Defendant denied tearing the underwear and did not at any time claim they were torn accidentally during consensual sexual relations.

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by [E.C.] on or about August 10, 2013 within the legal time period. [¶] In evaluating the weight and significance of that evidence, you may consider the effect, if any, of that late disclosure."

Defendant's argument, raised for the first time on appeal, that he suffered prejudice by the late disclosure because he may have been able to obtain an expert to examine the underwear and opine that the tearing was consistent with a consensual act is wholly speculative and fails to demonstrate actual prejudice. Defense counsel argued below only that he wanted to be able to argue that defendant's DNA was not found on the underwear. No DNA testimony was offered by any party, presumably because it was a nonissue in light of the victim's statement that defendant did not penetrate her with his penis, but only his fingers. The court's chosen sanction was a measured approach well within its broad statutory discretion.

With respect to defendant's contention the late disclosure also amounted to a *Brady* violation, respondent contends the argument has been forfeited. Defendant concedes that a specific objection under *Brady* was not raised in the trial court, but claims the issue was nonetheless preserved for appeal because it is merely a constitutional "gloss" to the same facts argued to the court regarding the discovery violation under state law.

A constitutional argument, raised for the first time on appeal, will *not* be deemed forfeited where it does not "invoke facts *or legal standards* different from those the trial court itself was asked to apply, but merely assert[s] that the trial court's act or omission, insofar as it was wrong for the reasons actually presented to that court, had the additional *legal consequence* of violating the federal Constitution." (*People v. Avila* (2006) 38 Cal.4th 491, 527, fn. 22, first italics added; accord, *People v. Partida* (2005) 37 Cal.4th 428, 433-439.)

Determining whether a *Brady* violation has occurred under the federal Constitution is not governed by the same legal standards as assessing a state law violation of Penal Code section 1054.1. " 'There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.' [Citation.]" (*People v. Salazar* (2005) 35 Cal.4th 1031, 1043.)

The trial court was not asked to consider whether the underwear was favorable to the defense in ruling on its admissibility, a key aspect to finding and addressing a claimed *Brady* violation. The argument is therefore properly deemed forfeited. (*People v. Partida, supra*, 37 Cal.4th at p. 436 [to the extent the federal due process argument regarding admission of evidence was not identical to state law argument under Evidence Code section 352, the argument was forfeited].)

In any event, the argument is without merit. Defendant fails to explain how the evidence was favorable to his defense. Favorable evidence within the meaning of *Brady* means evidence that is either "exculpatory" or "impeaching." (*People v. Salazar*, *supra*, 35 Cal.4th at p. 1043.) Put another way, "[e]vidence is 'favorable' if it hurts the prosecution or helps the defense." (*People v. Earp* (1999) 20 Cal.4th 826, 866.) Defendant concedes the underwear could not be used to impeach any prosecution witness. Indeed, the underwear corroborated the victim's version of the assault, as well as the witness testimony of Ms. Carbajal. Defendant also does not explain how the underwear could have benefitted his defense other than the speculative argument that had they been disclosed earlier, an expert may have been retained that could have opined the tearing was consistent with consensual sex (a dubious notion). But, defendant did not testify they were torn accidentally during consensual sex; he unequivocally denied tearing them at all.

2. The Robbery Count

Defendant next argues his conviction for second degree robbery is not supported by substantial evidence. Defendant contends his conviction should be reversed, or alternatively, modified to an attempted robbery. He contends the evidence is insufficient as to two elements: (1) there was no evidence he took the cell phone from Ms. Carbajal by force or fear; and (2) there was no evidence the crime was complete because defendant never escaped with the phone to a place of temporary safety. Our task is to review " 'the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a

reasonable jury could find the defendant guilty beyond a reasonable doubt.' [Citation.]" (*People v. Johnson* (2015) 60 Cal.4th 966, 988.)

Robbery is defined as "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (Pen. Code, § 211.) Defendant argues the evidence shows, at most, that he grabbed Ms. Carbajal's cell phone from her hand, but did not exert the quantum of force required to transform the act from theft to robbery. We disagree.

"[W]here a person wrests away personal property from another person, who resists the effort to do so, the crime is robbery, not merely theft." (*People v. Burns* (2009) 172 Cal.App.4th 1251, 1257.) " ' "[A]ll the force that is required to make the offense a robbery is such force as is actually sufficient to overcome the victim's resistance . . . ." ' [Citation.]" (*Id*. at p. 1259.) Ms. Carbajal attested to being involved in a struggle with defendant, that he struck her when she tried to take his picture with her phone, and that when she went to take a picture of his license plate, he followed her and snatched the phone away from her. Ms. Carbajal said she yelled at him and tried to get it back but he started to run off and was only stopped because Mr. Velador interceded and confronted defendant. This is substantial evidence that defendant forcibly took the phone from Ms. Carbajal and resisted her efforts to recover it.

Further, even where the initial taking is not accomplished by force or fear, the requisite force for robbery may be found if the defendant uses force or fear in attempting to flee. " '[A] robbery occurs when [the] defendant uses force or fear in resisting attempts to regain the property or in attempting to remove the property from the owner's immediate presence regardless of the means by which [the] defendant originally acquired the property.' [Citation.]" (*People v. Pham* (1993) 15 Cal.App.4th 61, 65-66 (*Pham*).) In *Pham*, the defendant was interrupted in the process of stealing property from the victim's car by the victim and his friend. (*Id*. at p. 64.) The defendant began to flee with a bag taken from the car, but was overtaken by the victim and his friend. The defendant dropped the bag and began fighting with the victim and his friend. The two were eventually able to subdue the defendant until the police arrived. (*Ibid*.) *Pham* rejected

the defendant's contention there was insufficient evidence to establish robbery, reasoning "the possession and asportation of the victims' property began when defendant started to walk away from [the] car with the loot and continued throughout the time defendant forcibly resisted the victims' attempts to take back their property. There is no requirement that defendant escape with the loot[.]" (*Id*. at pp. 66-67.)

Here too, the evidence shows defendant was interrupted in his effort to flee the scene whereupon he engaged in a violent confrontation with Mr. Velador who took the phone back for Ms. Carbajal. There is ample evidence to support the force element.

Defendant contends that even if there is sufficient evidence of force, there was no evidence of asportation because Ms. Carbajal's phone was immediately taken back by Mr. Velador and returned to her. The taking element of robbery includes both gaining possession of the victim's property and asportation or carrying away. (2 Witkin & Epstein, Cal. Crim. Law (4th ed. 2012) Crimes Against Property § 96, pp. 133-134.) The Supreme Court has explained that in order "[t]o satisfy the asportation requirement for robbery, '*no great movement is required, and it is not necessary that the property be taken out of the physical presence of the victim*.' [Citation.] '[S]light movement' is enough[.]" (*People v. Hill* (1998) 17 Cal.4th 800, 852, italics added [substantial evidence of asportation where the defendant, standing outside the passenger window of the car in which the victim was sitting, grabbed the victim's purse from her, rummaged through it, declined to take anything and then gave it back]; see also *Pham*, *supra*, 15 Cal.App.4th at p. 67 [" ' "Asportation . . . may be fulfilled by wrongfully . . . removing property from the . . . control of the owner, . . . even though the property may be retained by the thief but a moment." ' "].) Therefore, it was not necessary for defendant to have maintained possession of the phone for any extended period, or to have successfully fled from the scene or the presence of Ms. Carbajal.

Defendant nonetheless argues there was no evidence of a completed robbery because he never escaped the scene to a place of temporary safety. Defendant conflates the *commission* of a robbery with the *duration* of the asportation element for purposes of determining other ancillary consequences of the crime, such as felony murder, imposition

of aiding and abetting liability, or use of a firearm in the commission of a robbery. The language primarily relied upon by defendant concerns the escape rule and is taken from *People v. Carroll* (1970) 1 Cal.3d 581 (*Carroll*).

In *Carroll*, the defendant confronted the victim in the bathroom of a bar, pointed a gun at him and demanded his wallet. (1 Cal.3d at p. 583.) The victim relinquished his wallet, and then ran from the bathroom as the defendant rummaged through it. Discovering the wallet contained no money, the defendant immediately discarded the wallet and ran out into the bar, yelling for the victim. He shot at the victim twice who was trying to find a place to hide in the bar, grazing him with one shot and causing a more serious injury to the victim's stomach with the second. (*Ibid*.) The defendant challenged the great bodily injury finding related to his robbery conviction on the grounds that the robbery was complete in the bathroom, and that any shooting that occurred thereafter was a separate and distinct crime. (*Id*. at p. 584.) *Carroll* rejected that argument, reasoning that the "nature of the crime is such that a robber's escape with his loot is just as important to the execution of the crime as obtaining possession of the loot in the first place. Thus, the crime of robbery is not complete until the robber has won his way to a place of temporary safety." (*Id*. at p. 585.)

In discussing the duration of robbery for purposes of affirming the great bodily enhancement, *Carroll* did *not* purport to alter the law that a robbery may be deemed complete even where the defendant has possession of the stolen property only for a brief moment and does not successfully flee the presence of the victim. Indeed, *Carroll* explained that the "taking of [the victim's] wallet constituted a robbery even though defendant discarded it as soon as he discovered it was empty." (*Carroll, supra*, 1 Cal.3d at p. 584.) None of the cases cited by defendant are authority for the proposition that defendant had to flee the scene entirely before the robbery could be deemed complete.

DISPOSITION

The judgment of conviction is affirmed.

GRIMES, J.

WE CONCUR:

RUBIN, Acting P. J.

FLIER, J.